Office-Supreme Court, U.S.
FILED
MAR 16 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 922

WITHLACOOCHEE RIVER ELECTRIC COOPERATIVE, INC., VALENCIA RESTAURANT & MOTEL, INC., AND SOUTHERN LEASING, INC.,

Petitioners,

v.

TAMPA ELECTRIC COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

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WILSON - EPES PRINTING CO. - RE 7-6002 - WASHINGTON 9, D. C.

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Petitioners, by their attorneys, pray that a writ of certiorari issue to review the final judgments of the Supreme Court of the State of Florida entered in this cause on November 1, 1963, and December 18, 1963.

OPINIONS BELOW

No opinion was issued in connection with the temporary restraining order by the Circuit Court of Pasco County, Florida. The opinion of the District Court of Appeal, Second District, on the issuance of the temporary restraining order is reported at 115 So. 2d 9 and is set forth in Appendix A. The opinion of the Supreme Court

of Florida on the issuance of the temporary restraining order is reported at 122 So. 2d 471 and is set forth in Appendix B. The opinion of the Circuit Court of Pasco County, Florida, on the request of Tampa Electric Company for a permanent injunction is not reported; it was stated orally by the court and was recorded by the court reporter and is set forth in Appendix C. The opinion of the District Court of Appeal, Second District, on the issuance of the permanent injunction is reported at 148 So. 2d 732 and is set forth as Appendix D. The opinion of the Supreme Court of Florida on the issuance of the permanent injunction is reported at 158 So. 2d 136 and is set forth as Appendix E.

JURISDICTION

The judgment of the Supreme Court of the State of Florida upholding the issuance of the permanent injunction was filed on November 1, 1963. A petition for rehearing filed by petitioners was denied on December 18, 1963.

The jurisdiction of this Court is invoked under 28 U.S.C.A. 1257 (3), and Rule 19-1-(a) of the Revised Rules of the Supreme Court of the United States.

QUESTIONS PRESENTED

1. Does the Florida Rural Electric Cooperative Act, interpreted by the Supreme Court of Florida

(a) to preclude a rural electric cooperative from furnishing electric service to persons to whom central station electric service is "available" from a public utility company lacking an exclusive franchise, and

(b) to require a rural electric cooperative to discontinue furnishing electric service to persons with

whom it has contracts for such service and to whom it has constructed service facilities, if electric service was "available" to such persons at the time the cooperative commenced furnishing services to them, deprive such cooperative and such customers of property without due process of law and deny to them the equal protection of laws in contravention of Amendment XIV of the Constitution of the United States, and also result in an impairment of the obligation of the contracts between such cooperative and such persons which is forbidden by Article 1, Sec. 10(1) of the Constitution of the United States?

2. Does the refusal of state courts, in interpreting statute, to consider legislative history, and long established interpretation by agency charged with administration, of such statute, constitute lack of due process in violation of Amendment XIV of the Constitution of the United States?

3. Does the Rural Electrification Act of 1936 prevent its cooperative borrowers from furnishing electric service to persons not receiving central station electric service but to whom central station electric service is available from other sources?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Pertinent provisions of the Rural Electrification Act of 1936, 7 U.S.C.A. 902, 904 and 913 are set forth in Appendix F.

Pertinent provisions of the Florida Rural Electric Cooperative Act, 425.04, Florida Statutes, are set forth in Appendix G.

Art. I, Sec. 10, cl. 1 of the Constitution of the United States (Clause Prohibiting States From Impairing Ob-

ligation of Contracts and the Due Process Clause and the Equal Protection of the Laws Clause of Amendment XIV are set forth in Appendix B.

STATEMENT

Petitioner Withlacoochee River Electric Cooperative, Inc. (hereinafter called the "Cooperative"), is a small, non-profit, member-owned and controlled rural electric cooperative, wholly financed by the Federal Rural Electrification Administration (hereinafter called the "REA"), furnishing electric service to its rural members. (Tr. 88-91)[1]

Cooperative entered into a contract with Petitioner, Valencia Restaurant & Motel, Inc. (hereinafter called "Valencia") to furnish electric service to Valencia to be used in a restaurant and motel building which was under construction. Valencia became a member of Cooperative. (Tr. Valencia 77-78) The contractor erecting the building entered into a contract with the Respondent, Tampa Electric Company (hereinafter called "Tampa"), a public utility company also having electric lines in the vicinity, for the purchase of electricity for construction purposes. (Tr. Valencia 74-75) Tampa obtained a temporary restraining order enjoining the Cooperative from extending service to Valencia. (Tr. Valencia 9)

Cooperative furnished electric service to Petitioner, Southern Leasing, Inc. (hereinafter called "Southern"), a member of the Cooperative, pursuant to a written contract. (Tr. 84-86). Tampa obtained a temporary restraining order enjoining Cooperative from continuing service to Southern. (Tr. 11)

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[1] Both records have been filed. However, since both records present the issues, references to the Record in this Petition are always to the Record in the Southern Leasing case (Case No. 32,630), except where indicated otherwise by reference: "Tr. Valencia."

The electric distribution lines of both the Cooperative and Tampa were in close proximity to Valencia and Southern and the lines of either could have served Valencia and Southern. (Tr. 87).

Cooperative moved to dissolve both restraining orders, which motions were denied.

The Cooperative thereupon appealed to the District Court of Appeal, Second District, which reversed both cases in a single opinion. The District Court of Appeal held that Tampa had no standing to sue because it was, in effect, objecting to an alleged ultra vires act. Tampa appealed this decision to the Supreme Court of Florida, which reversed the District Court of Appeal and although the only question before it was that of standing to sue, the Florida Supreme Court proceeded to state its opinion of the law of the case, based upon its mistaken understanding of the meaning of the Rural Electrification Act of 1936. It interpreted that Act as meaning that the Rural Electrification Administration could lend money to construct facilities to serve only persons who could not otherwise be served. The Florida Supreme Court then proceeded to interpret the state statutes as limiting service by the Cooperative to rural consumers who did not have service available from other sources, basing such interpretation of the state statute upon its interpretation of the Rural Electrification Act—a Federal statute. Until the Supreme Court of Florida issued its opinion on the occasion of the first appeal from the District Court, no consideration had been given to the meaning of the Federal and state statutes involved. Even in the Supreme Court opinion, the legislative history of neither statute was discussed, nor was there any consideration of the post legislative history of the Rural Electrification Act showing that it had been uniformly interpreted as it was plainly worded, to permit the financing of facilities to serve *any person* who was not the

receiving central station electric service, no matter how available such service might be from another source.

The Supreme Court of Florida remanded the cases for hearing on the request of Tampa for a permanent injunction.

After the cases had been remanded to the trial court, Valencia was permitted to intervene as a defendant in the case involving it (32,629) and Southern was permitted to intervene as a defendant in the case involving it (32,630).

After a hearing, the trial court issued a permanent injunction in each case, which judgments were appealed by Petitioners directly to the Supreme Court of Florida. That court transferred the cases to the District Court of Appeal. The District Court of Appeal then affirmed the trial court in both cases. Subsequently, the Supreme Court of Florida affirmed the District Court of Appeal in both cases.

This petition embraces both cases because the Federal questions involved are the same.

HOW THE FEDERAL QUESTIONS WERE RAISED IN PROCEEDINGS BELOW

The Federal questions sought to be reviewed were first raised in the Circuit Court, Pasco County, by motion to dissolve temporary restraining order. They were raised for the second time in the Circuit Court, Pasco County, in the answers and defenses of the petitioners. The Federal questions sought to be reviewed were raised for the first time in the District Court of Appeal, Second District, by assignments of error. They were raised the second time in the District Court of Appeal, Second District, by assignments of error. The Federal questions sought to be reviewed were raised for the first time in the Supreme Court of Florida by petition for rehearing.

following decision by that Court on certiorari granted adverse to Withlacoochee, reported in 122 So. 2d 471. They were raised in the Supreme Court of Florida the second time by assignments of error of petitioners and by petitions for writ of certiorari. They were raised in the Supreme Court of Florida for the third time by petition for rehearing.

REASONS FOR GRANTING THE WRIT.

I Petitioners Deprived of Property Without Due Process

The Florida Statute as interpreted by the Supreme Court of Florida deprives Cooperative not only of the revenue it would have received from Valencia and Southern Leasing, but also will result in Cooperative being unable to receive revenues from virtually any additional consumers in the future because its lines are so located that the consumers which would be served by it can also be served by the lines of other power suppliers (Tr. 87-88). Consequently under the Florida Supreme Court's ruling Cooperative is prohibited from serving any such persons.

In addition to being prohibited from serving virtually all future loads which may develop along its lines, the extensions to its facilities which were constructed solely to serve Valencia and Southern Leasing are rendered valueless other than for salvage.

It must be understood that an electric suppier does not come into existence full-blown, serving at the outset all those consumers whom it will ever serve. Nor can it constuct facilities sufficient to serve only those whom it will serve initially. On the contrary, a supplier of electric service must construct, in the first instance, facilities which will enable it to serve additional consumers. An organization engaged in furnishing electric service would wither away, slowly or quickly, depending upon the cir-

cumstances in the particular case, if it could not serve new consumers who could be served feasibly from its system. If it were restricted to serving only those new consumers whom other suppliers could not or would not serve, its very existence would depend upon those other suppliers. The Cooperative would, in fact, be doomed to perish through a program of attrition and in the end, as the Circuit Court says:

> ". . . it is within the scope of that philosophy that eventually there would be no rural electric cooperative". (Tr. 30)

The property of the Cooperative would then have only such value as the other suppliers were willing to pay for it, or its value as salvage. The Florida Courts' interpretation of the Florida Statute would indeed result in the destruction of the value of the Cooperative's property, in the taking of the Cooperative's property without due process of law.

It should be emphasized that it is not the language of the Florida statute itself which is unconstitutional, but the erroneous interpretation which the Supreme Court of Florida has given to it, superimposed upon an erroneous interpretation of the Federal Rural Electrification Act, which results in it being unconstitutional. This interpretation is plainly in violation not only of the language of the Florida Statute, but also of its legislative history.

The Florida Rural Electric Cooperative Act provides:

> "that no cooperative shall distribute or sell. . . . electric energy to any person residing within any town, city, or area, which person is receiving adequate central station service . . ." (Appendix G)

It will be seen that under the Act a cooperative is authorized to serve any person other than a person who already is receiving adequate central station service. The Florida Courts misinterpreted this language

to mean that even though a person were not receiving central station service, the cooperative was precluded from serving such person if central station service were "available" to him. This was the interpretation of the Florida Courts despite the fact that the legislative history was that the prohibition was limited to a person already receiving service as evidenced by the fact that the Florida House of Representatives had defeated a substitute provision which had been offered which would have prohibited service by a cooperative "within any town, city, or area which is now being served". (Tr. 58-60) There could be no clearer demonstration that the legislature intended the proscription to apply only to service to persons actually receiving service from some other supplier.

It is realized, of course, that a state supreme court is the final authority of the meaning of a state statute, but a state supreme court may not interpret a state statute so as to violate provisions of the Constitution of the United States. If the supreme court of Florida chooses to interpret the Florida statute so that a cooperative may not serve a consumer if electric service is available from another source, despite the plain language and the legislative history of the statute to the effect that a cooperative may serve any person in a rural area who is not already receiving central station service (regardless of the "availability" of service from another source), and if the Florida supreme court wishes to avoid Federal questions in such interpretation of the Florida statute, it must interpret the Florida statute so as to avoid the taking of property without due process of law. The statute must be interpreted to mean that once the Cooperative is permitted to construct facilities in an area, it must be permitted to serve all those whom it can serve and who desire service from it. The statute may not be interpreted so as to permit the Cooperative to construct its facilities—which facilities must be sufficient at

the outset to serve additional consumers—and then, having permitted the Cooperative to construct its facilities, to interpret the statute to destroy the value of those facilities by not permitting the cooperatives to serve additional consumers when such service is available from another source.

Petitioners, Southern Leasing and Valencia, had contracts to receive electric power from the Cooperative. One of the reasons given for desiring service from the cooperative, which is a very practical one, is that the cost of electric power would be less from the Cooperative than the cost of electric power from Tampa. The result of the Florida court's interpretation is to require Southern Leasing and Valencia to accept electric power service from Tampa. This is destroying the fundamental right which Southern Leasing and Valencia should have to select the company from which they will receive electric power in a situation where power is available from both and at a lesser cost from the one than the other. Thereby valuable property rights of Southern Leasing and Valencia have been violated without due process by the Florida courts.

II Petitioners Denied Equal Protection of The Laws

The Florida Statute, as interpreted by the Florida Supreme Court also violates the prohibition in the Fourteenth Amendment to the Constitution against a State denying persons within its jurisdiction the equal protection of the laws. In this case the antagonists are a rural electric cooperative and a public utility company. They are both privately owned, the public utility company by its stockholders and the cooperative by its members. Neither party has any power to furnish service beyond that extended by its enabling Act. Neither party is given any right to serve which even implies the right to prevent the other party from furnishing service. To interpret the Florida Statute as meaning that the public utility company can

enjoin the cooperative from serving any consumer whom the public utility company wishes to serve is to deny the cooperative the equal protection of the laws.

The Florida Supreme Court made it crystal clear that it did not believe that cooperatives were entitled to the same protection of the laws which other suppliers of electricity were granted. The Supreme Court of Florida affirmed the Circuit Court of Pasco County, which admitted this unequal treatment. The admission was phrased in this language:

> "Now, it appears to be the philosophy that the Supreme Court of this State has adopted that rural electric cooperatives are supplemental to private industry. If they be so, then it is also true that rural electric cooperatives and private industry do not and are not intended to compete on an equal basis. The contention of the defendant, that to let the plaintiff prevail would cause restriction upon the service of the defendant might well be true; but under the philosophy announced by the Supreme Court it would appear that the rural electrification program was a stop-gap program, a crash program, if you please, and that as a part of that program there is a conscious and planned program of anticipated attrition. In other words, as an area becomes more urbanized, as certainly this area is, it is within the scope of that philosophy that eventually there would be no rural electric cooperative. We have to look at the time and the situation in which rural electric cooperatives were started; not only in this area but in all areas. They had several governmental purposes to serve. Some of these purposes were economic, some of them were social. But the mere fact that creation does not, so long as that creation is for a specific purpose, necessarily mean that some program that has been created must always exist. It may well be that in the future these rural electric cooperatives will be converted to regular private industries on an equal

basis with other private industry. Certainly if the philosophy is to give private industry the preemption, as it appears to be from our Florida statutes, then these facilities may at some time in the future be acquired by private industry. Again it may be an indication of urbanization that there are private industries now in this county which are willing to come in and serve customers. This is a fact that has been discussed by counsel here and I think cannot well be controverted.

"My point simply is that I recognize that under the statutes competition is not on an equal basis, and apparently from the Supreme Court's interpretation of the statute it is not intended to be on a free and equal basis. . . ." (Tr. 29-30) (App. C).

Thus the law of Florida is being interpreted to make cooperatives subservient to public utilities. There is no justification to this difference in treatment. A non-profit cooperative, owned by its members, is entitled to the same treatment as a profit making public utility company owned by its stockholders. When the Florida Supreme Court interprets the Statutes of Florida so as to grant to a non-profit cooperative lesser rights in the furnishing of electric service than are bestowed upon the profit making companies, the Supreme Court of Florida is interpreting the Florida Statutes so as to deny the cooperative the equal protection of the laws.

The injustice of this unequal protection of cooperatives and profit making companies is highlighted by the history of the development of the Cooperative. The history of the Cooperative resembles that of the almost 1000 other rural electric cooperative borrowers from the REA scattered across the nation. It was organized by a group of farmers and other rural residents who were unable to obtain electric service from Tampa or any other electric utility at costs which they could afford to pay. They obtained a loan to cover the cost of constructing distribu-

tion facilities to serve themselves. They own and control their cooperatives, with each member, who must be a user of electricity furnished by the Cooperative, having one vote in the affairs of the Cooperative. All of the amounts paid to the Cooperative for electric service which are in excess of the Cooperative's cost of furnishing such service are returned to the members as capital credits on the basis of the members' patronage. (Tr. 91) The Cooperative operates in sparsely populated areas since Tampa and the other profit electric utilities already had furnished service to the lucrative areas. The Cooperative serves only 2.8 consumers per mile of line, contrasted to Tampa's 40 to 45 customers per mile of line. (Tr. 91-92) Now, after the Cooperative has made a huge investment to serve these sparsely populated rural areas, Tampa comes along when profitable loads develop such as Valencia and Southern Leasing and insists on the exclusive right to serve them.

Petitioners, Southern Leasing and Valencia, likewise are denied the equal protection of the laws by being precluded from obtaining electric service from a supplier of their own choice when no supplier of electricity possesses an exclusive franchise to serve them.

III. Petitioners Contracts Impaired

The impairment of the obligation of the contracts which the Cooperative had entered into with Southern Leasing and Valencia is so evident from the facts set forth in the Statement herein as not to require discussion.

The interpretation of the Florida Statute given to it by the Florida courts also would impair the obligations of the contracts between the Cooperative and the United States of America providing for the loans to the Cooperative to finance the construction of its facilities. In full reliance upon plain language of the statutes involved and the clear legislative intent expressed in the enactment of those stat-

utes, the Federal government has loaned the Cooperative and other electric cooperatives of Florida more than $93,000,000 under contracts requiring the repayment of the loans with interest within 35 years. (Report of the Administrator of the Rural Electrification Administration 1963, Table 1) Also relying upon the clear language of the statutes and the legislative intent expressed in their enactment, the Cooperative and the other electric cooperatives of Florida have used the borrowed money to construct facilities to serve their consumers and have entered into contracts with such consumers.

IV. Statute May Become Invalid By Reason of Change In Circumstances

There is an additional reason why the interpretation of the Florida Supreme Court would constitute a violation of the defendants' constitutional rights under the Fourteenth Amendment and Section 10 of Article I of the United States Constitution. It is well settled law that:

> "A statute valid when enacted may become invalid by a change in the conditions to which it is applied." *Nashville, Chattanooga & St. Louis Railway* v. *Walters, Commissioner of Highways, et al.*, 290 U.S. 405, 415 (1935); *Atlantic Coast Line Railroad Co.* v. *Ivey*, 148 Fla. 680, 5 So. 2d 244.

Even admitting, *arguendo*, that the interpretation which the Florida Supreme Court has given to the Florida statute involved can properly be given, nevertheless the application of the statute, as thus interpreted, to the Cooperative at this late date would constitute a taking of the property of the Cooperative without due process of law, a denial to this Cooperative of equal protection under the law, and an impairment of the obligations of the contracts which this Cooperative has entered into in good faith.

It is obvious that an electric distribution system of any kind cannot long exist if it is denied the right to serve all new consumers in its area of service. As admitted by the lower court in this case, such a restriction on the right to serve could doom an electric supplier to extinction through attrition. And since the lines of Tampa, and of the other Florida commercial power companies, are located throughout the state, the Florida Court's ruling would impose such a limitation on the Cooperative.

This Cooperative, and the other electric cooperatives of Florida, built their systems because the existing electrical suppliers could not or would not render the service required in the rural areas. If the Florida statute always meant what the Florida Court in this case says it means, then it became incumbent upon the other power suppliers to assert their rights seasonably and reasonably. They should have promptly tested the right of the Cooperative, and of the other Florida cooperatives, to serve persons to whom service was "available" from their systems. Not having done so, having in effect slept on these rights for approximately 20 years, and having watched and permitted the Cooperative and the other cooperatives of Florida to borrow more and more money from the Federal government to construct more and more facilities to serve more and more consumers, they cannot at this late date be heard in complaint.

If the Florida statute is to be given the meaning given to it by the Florida Courts in this case, it must be given the further meaning that the existing power suppliers must assert their rights "early in the game" and not after the Federal government has made large loans to the cooperative and the cooperative has constructed extensive facilities to serve consumers.

Thus, even if it is admitted, *arguendo*, that the Florida statute has the meaning now ascribed to it by the Florida courts, and that that statute, as thus interpreted, was

constitutional when enacted, its application as the Florida Court would apply it to the existing facts would clearly constitute a violation of the Cooperative's rights under the Constitution of the United States, as above set forth.

V Petitioners Denied "Day In Court"

When the case was before the Supreme Court of Florida the first time, the only question before it was Tampa's standing to sue. No other issue was discussed before the Court by either of the parties and the Court did not have before it the legislative history of either of the statutes nor the administrative interpretations which had been made of the Federal statute. The Court proceeded to interpret the statute without this necessary information and without the benefit of counsels' analysis thereof. In doing so it expressed its philosophy of the rights possessed by cooperatives under the statute. On the trial of the case on its merits in connection with the issuance of the permanent injunction, the trial court considered the expression by the Supreme Court in its opinion as disposing of the case on its merits and refused to give any consideration to the legislative history and post legislative and administrative interpretations of the statute. The trial court made this statement:

> "We have had facts, law, and reasoning regarding interpretation of the word 'person' in the State law and in the Federal law. I have two limitations within which I must operate, if not completely at least in part. Those two limitations are the decision that we have from the Supreme Court and the practical result of any final order or decree that I might enter. It is my thinking that even though this proceeding was remanded back here that we should not use this forum merely as an additional appeal, but rather the matters as to legislative intent and administrative interpretation should have been or should be handled in one of two ways: either these matters should have

been presented to the Supreme Court before it rendered its last decision, or, if an appeal result from this case and goes to the Supreme Court, it should be left to the Supreme Court to completely change its interpretation if that is the Supreme Court's desire. That does not keep me from rendering certain interpretations within the general framework of the Supreme Court decision." (App. C.

Thus, the trial court specifically refused to give any weight to the information in the record as to the legislative intent and administrative interpretations relating to the Federal and State statutes involved. That court left it to the Florida Supreme Court to make the changes in its previous opinion which were clearly indicated by the record.

The trial court, however, did clearly state that the logic of the argument of counsel for the defendants was "undeniable" with respect to the interpretation of the word "person" (T. 27). Thus, even though the trial court admitted the complete logic of the Cooperative's presentation, it felt compelled to reject that logic because of the previous decision of the Supreme Court. The trial court stated in unmistakable terms its interpretation of the "philosophy" of the Supreme Court of Florida, as follows:

"Now, it appears to be the philosophy that the Supreme Court of this State has adopted, that rural electric cooperatives are supplemental to private industry. If they be so, then it is also true that rural electric cooperatives and private industry do not and are not intended to compete on an equal basis. The contentions of the defendant that to let the plaintiff prevail would cause restriction upon the service of the defendant might well be true, but under the philosophy announced by the Supreme Court it would appear that the rural electrification program was a stop-gap program, a crash program, if you please, and that as a part of that program there is a conscious and planned program of anticipated attrition.

> In other words, as an area becomes more urbanized, as certainly this area is, it is within the scope of that philosophy that eventually there would be no rural electric cooperative. We have to look at the time and the situation in which rural electric cooperatives were started, not only in this area but in all areas. They had several governmental purposes to serve. Some of these purposes were economic, some of them were social. But the mere fact that creation does not, so long as that creation is for a specific purpose, necessarily mean that some program that had been created must always exist. It may well be that in the future these rural electric cooperatives will be converted to regular private industries on an equal basis with other private industry. Certainly if the philosophy is to give private industry the preemption, as it appears to be from our Florida statutes, then these facilities may at some time in the future be acquired by private industry. Again it may be an indication of urbanization that there are private industries now in this county which are willing to come in and serve customers. That is a fact that has been discussed by counsel here and I think cannot well be controverted.
>
> My point simply is that I recognize that under the statutes competition is not on an equal basis, and apparently from the Supreme Court's interpretation of the statute it is not intended to be on a free and equal basis." (App. C)

It is this philosophy, which the trial court contends was enunciated by the previous opinion of the Supreme Court, which controlled the decision of the trial court. *In other words, the trial court has adopted a philosophy which was founded upon no facts of record and which is completely opposite to what the record shows.* This is clear error and the affirming of its opinion by the District Court of Appeal and the Supreme Court deprives the peti-

tioners of property without due process of law and also denies them equal treatment under the law.

Mere irregularities or errors by a State tribunal do not of themselves constitute a violation of the Fourteenth Amendment, but if it is not a mere irregularity, or error in judgment, relief will lie, as stated by Corwin in *Constitution of the United States of America*, Senate Document No. 170, 82 Cong. 2nd Sess. 1953, page 1140:

> "Also, whenever a wrong judgment is rendered, property is taken when it should not have been; yet whatever the ground may be, *if the mistake is not so gross as to be impossible in a rational administration of justice*, it is no more than the imperfection of man, not a denial of constitutional rights." (emphasis ours)

It is the underscored language to which we must address ourselves at this stage of the proceedings. Although at the time the Supreme Court of Florida rendered its first opinion, the record was completely silent on the meanings of the Federal and State statutes involved, at the time of that Court's second opinion, the record contained definite and uncontrovertible proof that the statutes involved did not have the meaning attributed to them in that previous opinion.

However, the Supreme Court explicitly refused to consider this additional information, necessary to a correct interpretation of the statute because it contended that it already had decided the issue in its first opinion. As a result, the Petitioners never had "a day in court".

It would seem abundantly clear that in the judgment of the Florida Supreme Court, review of which is requested by this Petition, there is present a mistake so "gross as to be impossible in a rational administration of justice."

VI State Supreme Court Decision Permeated By Erroneous Interpretation Of Federal Statute

The misinterpretation of the Federal Act permeates and pervades the entire decision of the Supreme Court of Florida. That Court cannot avoid the fact by saying, in its last opinion (App. E), that its statements, or rather its misstatements, with respect to the Federal Rural Electrification Act are mere dicta. The Circuit Court did not so think and based its decision on the "philosophy" of the Florida Supreme Court, which was based on that Court's erroneous interpretation of the Federal Rural Electrification Act. The Florida Supreme Court affirmed the Circuit Court and did not disavow that "philosophy". Also, the Supreme Court Justice, who wrote the original opinion, wrote a special concurring opinion to the later opinion (App. E), in which he quotes a newspaper editorial entitled "REA Should Stick To Its Role". There is no doubt but that this mistaken understanding of the Rural Electrification Act—that REA should not finance facilities when service is "available" to an "area" from another source—is the basis for the decision.

The record thus reveals that beyond any doubt the Florida Supreme Court's entire decision is completely permeated with and the direct result of that court's erroneous interpretation of the Federal Rural Electrification Act. That court's erroneous interpretation of the Florida statute which resulted in the invasion of the Petitioners constitutional rights established, *supra*, resulted solely from its misapprehension of the meaning of the Federal statute. The lower court in issuing the permanent injunction was most explicit in basing its decision entirely on the "philosophy", enunciated in the Supreme Court's first opinion. Likewise, the Supreme Court refused to reconsider the matter in its last opinion, saying that it had decided the matter in its first decision.

The Florida Supreme Court's interpretation of the Rural Electrification Act that facilities financed by R.E.A. should not be used to serve in ". . . those areas in which as a matter of fact electricity is available by application to an existing public utility . . .". (Appendix B) is so clearly erroneous as to require little discussion here. Under Section 4 of that Act, (Appendix F), the only limitation on the electric service which can be furnished with facilities financed by loans from the Rural Electrification Administration is that service cannot be furnished "to persons in rural areas who are receiving central station service." Persons in rural areas not receiving such service may be served by the Rural Electrification Administration borrowers regardless of how "available" such service is to the "area" in which their premises are located or even if such service is readily available to their premises. *Kansas City Power & Light Company et al v. McKay et al*, 115 F. Supp. 402 (Dist. Ct., D. C., 1953. Complaint dismissed for lack of standing to sue. 225 F. 2d 924, C. A., D. C., 1955. Cert. denied, 350 U.S. 884, 1955) The Rural Electrification Act has always been so interpreted (S. Res. 21, 86th Cong., 1st Sess., adopted Aug. 21, 1959, tr. 61; letter of May 17, 1963, from Norman M. Clapp, Administrator of REA, to Cooperative, tr. 62), and the Senate of the United States has expressly approved this interpretation (S. Res. 21, *supra*, 86th Cong., 1st Sess., adopted Aug. 21, 1959, tr. 61)

VII The Questions Are Substantial

The questions involved herein are of the greatest importance, not only to the cooperatives of the State of Florida, which number 17, and which have borrowed over $93,000,000 for the construction of facilities to render electric service, but to all the rural electric cooperatives of the country, which number almost 1000, and which have borrowed in excess of $4,000,000,000 to render elec-

tric service in rural areas. The rural electric cooperatives in the State of Florida serve more than 100,000 consumers, and, nation-wide, the cooperatives serve approximately 5,000,000 consumers. (Annual Report to Congress by Administrator of REA for year 1963). Because each consumer served by a cooperative represents an average family of four, the cooperatives of Florida are furnishing electric service to more than 400,000 people, and the cooperatives nation-wide are serving approximately 20,000,000 people.

There can be no doubt as to the effect of this decision in the State of Florida. It may well mark the beginning of the end of the rural electric cooperatives there. The Circuit Court of Pasco County has admitted that the "philosophy" of the Supreme Court of Florida may well result in there being ". . . no rural electric cooperative" (App. C) and the District Court of Appeals and the Supreme Court of Florida have both affirmed that decision, without questioning the lower Court's interpretation of the philosophy of the Supreme Court of Florida.

This will happen because electric service from another source will become more and more "available", and the cooperatives will, under this test, be able to serve only such consumers as the other electric utilities in that area do not wish to serve. The process of "planned attrition" will proceed and "eventually there will be no rural electric cooperative". (App. C).

Thus, it is that this program which has benefited the country so greatly, and upon which so many people depend, and in which the United States Government has invested so much money, and which is plainly intended by the Congress to be a permanent program (the Rural Electrification Act permits loans up to 35 years duration), is now made a "crash", a "stop-gap" program.

If the judgment stands, the impact will be grave on the administration of the program of the Rural Electrification Administration nationwide. The repayment of the more than $5,000,000,000 in loans made by that Administration will be seriously jeopardized. The contribution being made by it to the national Rural Area Development program will be sharply reduced. The employment of several hundred thousand individuals, who either are working for REA borrowers directly, or are employed by independent engineers and contractors constructing the cooperatives electric systems, or by the manufacturers of electrical equipment and machinery which is purchased by consumers on the lines of the cooperatives, will be imperiled.

The improvement which has occurred in the standards of living on the farms of the nation, the removal of drudgery from farm life, the increase in agricultural production, the making possible of rural industry, the impact on the national economy, and the contribution to the national defense, resulting from the cooperative rural electrification activities in all of the states of the union other than Rhode Island and Connecticut, have been repeatedly recognized by the last five Presidents of the United States, and the Congressional Record over the last twenty-eight years is replete with testimonials from members of Congress to these accomplishments.

The Florida Rural Electric Cooperative Act is based on a Uniform Rural Electric Cooperative Act prepared by the Rural Electrification Administration which has been adopted in 28 states. Provisions similar to the provision in the Florida Act relating to service to persons not receiving central station service is found in the Uniform Acts of twelve states. Such Uniform Acts are:

Arizona—Electric Cooperative Act, Ariz. Rev. Stats. Ann. (1956) Sec. 10-751 *et seq.*

Arkansas—Electric Cooperative Corporation Act, Ark Stats. 1947 Ann. (1957 Replacement) Sec. 77-1101 thru 77-1136.

Georgia—Electric Membership Corporation Act, Ga. Code Ann. Ch. 34A-1.

Indiana—Rural Electric Membership Corporation Act, 10 Ind. Stat. Ann. (Burns, 1951 Replacement) Sec. 55-4401 *et. seq.*

Maine—Cooperative Enabling Acts. Me. Rev. Stat. (1954), Ch. 51 Sec. 1-24.

Nebraska—Electric Cooperative Corporation Act, 4 Neb. Rev. Stat. Ann. (1943, Reissue of 1958) Sec. 70-701 thru 70-738.

New Hampshire—Cooperative Marketing Association Act, N. H. Rev. Stat. Ann. (1955) Sec. 301:53 *et seq.*

New York—Rural Electric Cooperative Law, N. Y. Consol. Laws, Ch. 77-A (McK., Book 50-A).

North Dakota—Electric Cooperative Corporation Act, 2 N.D. Century Code Ann. Ch. 10-13.

Pennsylvania—Electric Cooperative Corporations Act, Pa. Stat. Ann. (Purdon, 1958) Tit. 14, Sec. 251 *et seq.*

Texas—Electric Cooperative Corporation Act, 3 Tex. Ann. Rev. Civ. Stat. (Vernon's), Art. 1528b.

Vermont—Electric Cooperative Act, Vt. Stats. Ann. (1959) Tit. 30 Sec. 3001 *et seq.*

If the Florida Supreme Court opinion is permitted to stand, it will be extremely persuasive to the courts interpreting the statutes of the other states which have "service" provisions closely similar to the Florida provision.

Similar provisions in other state statutes have been interpreted differently. For example, the Supreme Court

of Georgia has interpreted its statute as meaning a cooperative may serve an unserved person even though service is available from another source. *Savannah Electric Power Co. v. Planters Electric Membership Corp.*, 125 S.E. 2d 651 (Ga., 1962).

The issue in this case is an unsettled one which has never before been determined by this Court. It is submitted that the issues are of national application, of momentous public importance and call urgently for the consideration and determination of this Court.

VIII Conclusion

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

JULY TERM, A. D. 1959

Case No. 1002

WITHLACOOCHEE RIVER ELECTRIC COOPERATIVE, INC., a non-profit Florida corporation,
Appellant,

vs.

TAMPA ELECTRIC COMPANY, a Florida corporation,
Appellee.

Opinion filed September 30, 1959

Interlocutory Appeal from the Circuit Court for Pasco County; S. Henry Harris, Judge.

George C. Dayton of Dayton, Dayton & Luckie, Dade City, and J. Lewis Hall of Hall, Hartwell & Douglass, Tallahassee, for Appellant.

Sam Bucklew of Bucklew, Ramsey & Phillips, Tampa, William C. Harris of Ausley, Ausley, & McMullen, Tallahassee, and Larkin & Larkin, Dade City, for Appellee.

SHANNON, JUDGE.

This is an interlocutory appeal from a temporary restraining order granted to Tampa Electric Company, appellee-plaintiff, and against the Withlacoochee River Electric Cooperative, Inc., appellant-defendant, and from an order denying a motion by appellant-defendant to vacate.

Tampa Electric Company is engaged in the business of manufacturing, distributing and selling electric energy.

It is a public utility company in the State of Florida within the definition of Chapter 366, Florida Statutes, and holds a non-exclusive franchise to do business in the territory involved in this case. As a public utility it is subject to the provisions of Chapter 366, including the fixing of rates by the Florida railroad and public utilities commission and the requirement that it "* * * furnish to each person applying therefor reasonably sufficient, adequate and efficient service upon terms as required by the commission, * * *." The Withlacoochee River Electric Cooperative, Inc. is engaged in the same business as the Tampa Electric Company but is organized and exists under Chapter 425, Florida Statutes, which is an incorporation statute for cooperative, non-profit membership corporations, desiring to be organized thereunder, for the purpose of supplying electric energy in rural areas. A "rural area" is defined therein as:

> "* * * any area not included within the boundaries of any incorporated or unincorporated city, town, village or borough having a population in excess of twenty-five hundred persons;"

Section 425.04 sets out the powers given by the legislature to such cooperatives, included among which is the power to sell electric energy in rural areas (Subsection 4),

> "* * * provided, however, that no cooperative shall distribute or sell any electricity, or electric energy to any person residing within any town, city or area which person is receiving adequate central station service or who at the time of commencing such service, or offer to serve, by a cooperative, is receiving adequate central station service from any utility agency, privately or municipally owned individual partnership or corporation;"

Being an electric cooperative, organized under this chapter, the Withlacoochee River Electric Cooperative, Inc.,

is expressly exempted from the definition of "public utility" contained in Chapter 366 and is not subject to the provisions of that chapter.

In this case, as in another that we have before us (Withlacoochee River Electric Cooperative, Inc. v. Tampa Electric Company, Case No. 1149), Tampa Electric Company, hereinafter referred to as "Tampa Electric", obtained a temporary restraining order enjoining the Withlacoochee River Electric Cooperative, Inc., hereinafter referred to as "Withlacoochee", from furnishing electric energy to certain persons in a rural area. In both cases temporary restraining orders were entered and Withlacoochee appeals from the orders of the court below denying its motions to dissolve. Testimony was taken below at the hearings on these motions, and in its motions to dissolve and in the testimony presented Withlacoochee has stressed the merits of the orders as well as the question of whether or not Tampa Electric has any standing in a court of equity to bring these actions. The cases were ably argued before us, and we have been supplied with excellent briefs.

In the instant case Withlacoochee was restrained from supplying service to a corporation. The basis for the chancellor's findings was that the corporation is but the alter ego of a partnership on adjoining land, which Tampa Electric was at the time serving. Ordinarily, such a suit could not be brought by the Tampa Electric, but would have to be brought by the state itself. In their complaint Tampa Electric alleged that unless the restraining order was so entered, it would take away from Tampa Electric certain valuable property rights by virtue of depriving Tampa Electric of the revenue which it would receive from the services to be rendered in the future and that the Tampa Electric would be irreparably injured thereby. So, in deciding the right of Tampa Electric to bring this suit we must necessarily take into

account the allegations of the complaint, which we have just paraphrased.

While we have been referred to many cases from other state and federal courts, which we have studied, we are convinced that the law of this state is settled by the decisions of the Supreme Court of Florida. The allegations of the complaint, narrowed to their essence, are that Withlacoochee is competing with Tampa Electric and that the acts which it is doing or attempting to do are ultra vires. This case thus comes under the rule in St. Joseph Telephone & Telegraph Co. v. Southeastern Telephone Co., (1941), 149 Fla. 14, 5 So. 2d 55, wherein one of the questions is as follows:

> "Does a public service corporation, with a franchise to do business in a certain locality, but not an exclusive franchise, have the right to question by injunction the extent of corporate power of another public service corporation, with a franchise to do the same kind of business, solely for the purpose of keeping down competition?"

Our Supreme Court declared the law in Florida to be as follows:

> "Under the law and practice in Florida, the State may invoke appropriate judicial remedies for an abuse or violation of corporate or franchise authority that is conferred pursuant to State law; but private parties or corporations may not invoke judicial remedies for an abuse of, or a violation of, corporate or franchise authority conferred by the State. See Hitchcolk v. Mortgage Securities Corp., headnote 15, 95 Fla. 147, 116 So. 244; Vol. 10 Fletcher's Cyclopedia of Corporations, secs., 4854 et seq."
>
> "* * *"
>
> "Such allegations do not state facts that show unlawful trespass upon or other unlawful irreparable injury to any property of plaintiff, or that plain-

tiff is being, or is threatened to be, hindered or injured in its capacity to render its public service to warrant injunctive relief. Vol. 16 Fletcher's Cyclopedia Corporations, secs. 4854, 4856 et seq. Plaintiff does not allege an exclusive franchise corporate right, and cannot complain in the courts of competition. See New England R. Co. v. Central Ry. & Electric Co., 69 Conn. 47, 36 A. 1061. Its public business is regulated by statute under section 30, Article XVI, of the Constitution. See secs. 6333 (4369) et seq., C.G.L.; State v. Southern Tel. & Const. Co. 65 Fla. 270, 61 So. 506; State v. Peninsular Tel. Co., 73 Fla. 913, 75 So. 201, 10 A.L.R. 501; Town of Brooksville v. Florida Tel. Co., 81 Fla. 436, 88 So. 307."

An almost identical factual situation arose in the case of Southwestern Gas & Electric Co. v. City of Gilmer, Tex., (1954) 123 F. Supp. 11, and in 224 F. 2d 794 the Fifth Circuit affirmed the District Court. It is only from the District Court's opinion that the facts are discernible. In that case an electric company, a public utility, sought an injunction against an electrical cooperative, similar to Withlacoochee, enjoining it from serving persons who lived in a territory annexed by the City of Gilmer, Texas. In holding that the injunction suit brought by Southwestern would not lie the District Court said that the alleged acts of the co-op were ultra vires, not illegal, and under Texas law could only be attacked in a direct proceeding by the state. The chancelor said, among other things:

> "For the purpose of determining the right of Plaintiff to maintain this action and thereby question the right or power of the Co-op to furnish electric energy in the disputed areas, it will be assumed, without so holding, that the furnishing of electric energy to the inhabitants in the annexed areas of the City of Gilmer, above referred to, is beyond and outside the corporate powers of the Co-op.

"It is the settled rule in Texas that the question of whether or not a corporation has acted in excess of its lawful powers can only be raised by one interested in the corporation, or in a direct proceeding brought by the State. Houston Life Ins. Co. v. Dabbs, 132 Tex. 566, 125 S.W. 2d 1041; Staacke v. Routledge, 111 Tex. 489, 241 S.W. 994; Scott v. Farmers' & Merchants' National Bank, 97 Tex. 31, 75 S.W. 7; Russell v. Texas & P. Ry. Co., 68 Tex. 646, 5 S.W. 686; Antone v. Kurth Lumber Mfg. Co., Tex.Civ. App., 205 S.W. 2d 438; English v. Landa Motor Lines, Tex.Civ.App., 166 S.W. 2d 721 (Writ of Error Refused); Christopher v. City of El Paso, Tex. Civ.App., 98 S.W. 2d 394 (Writ of Error Dismissed); and 10 Tex.Jur. Sec. 257, p. 898."

Several cases decided in the State of New York have been cited by Tampa Electric wherein it appears that the courts of that state were not concerned with the lack of corporate or charter authority of the defendants, but rather, the cases involved violations of express statutory prohibitions of the Public Service Commission Law. In Fulton Light, Heat & Power Co. v. Seneca River Power Co., 197 N.Y.S. 319, decided in 1922, the New York Supreme Court held that plaintiff corporation had suffered a special injury and thus had standing in a court of equity for relief. Irrespective of whether the holding in the Fulton case is contrary to our decision, our own Supreme Court in the St. Joseph Telephone case, supra, decided in 1941, had the opportunity to read and digest the New York decisions and, having done so, established the doctrine which we have quoted from the St. Joseph case.

Tampa Electric is complaining of competition, as were the plaintiff utilities in the New York cases, and it stresses that the legislature intended to prohibit competition by the enactment of Section 425.04(4) Florida Statutes. The answer to that is perfectly obvious. If the legislature had intended to prohibit competition between

cooperatives and "central stations", it could easily have done so. As this provision is presently enacted, it is merely a detailed grant of authority in a special incorporation statute to cooperatives such as the defendant, and under the St. Joseph case Tampa Electric may not obtain injunctive relief for acts alleged to be in excess of the defendant's corporate authority.

For the reasons set forth the chancellor's order is reversed for the purpose of dissolving the temporary restraining order and entering an order dismissing the complaint.

Reversed.

ALLEN, CHIEF JUDGE, CONCURS SPECIALLY.
MURPHREE, JOHN A.H., A.J., DISSENTS.

ALLEN, Chief Judge, Concurring.

The majority opinion of the court cites the case of St. Joseph Telephone & Telegraph Co. v. Southeastern Telephone Co., 1941, 149 Fla. 14, 5 So. 2d 55, as a primary authority for reversing the lower court in this case.

The appellee herein astutely attempts to by-pass the impact of the decision of the Supreme Court of Florida in the St. Joseph Telephone case above cited, by alleging impending loss of profits of the appellee if the appellant is not restrained from competing with it in the Dade City trade territory. Appellee contends that infringement on its private right to do business is different from a public injury that would only justify intervention by the State to restrain the appellant from its ultra vires acts, and thus places appellee under the exception to the general rule enunciated in the St. Joseph Telephone case.

A loss of profits for a corporation from competition by another corporation, even though that other corporation

is committing ultra vires acts, is not the exception noted by the Supreme Court in its St. Joseph Telephone opinion, supra. If so, every ultra vires act committed could be enjoined by a private party if it could be alleged and determined that this act would injure the business of such party; thus competition could always be enjoined as competition usually affects the profits of the party affected by such competition.

A member of this court questioned counsel of the appellee during oral argument of this case that if the acts complained of by the appellee had been committed by another public utility company regulated by the same authority as the appellee and not restricted as the appellant is by its charter powers, could the acts be enjoined, and the reply was that it could not. If this was true, then the only party that could question such ultra vires acts is the State of Florida through its Attorney General or a stockholder of the cooperative appellant.

The question naturally arises what facts prevail in this case that brings it within the exception mentioned in St. Joseph Telephone & Telegraph Co. v. Southeastern Telephone Co., supra. In that case the facts, as set out in the opinion, are:

> "In a suit brought by the Southeastern Telephone Company, it was in effect prayed that further construction of the poles and lines of the proposed telephone line of defendant, St. Joseph Telephone and Telegraph Company, be enjoined and restrained until some short day upon which a hearing can be set for the equities of this cause to be determined; that on final hearing the court will decree that defendant be permanently enjoined from constructing any telephone line into the territory now being served by plaintiff and in any territory whatsoever not authorized by law under the charter issued by the State of Florida to defendant, it being in effect alleged that defendant, St. Joseph Telephone and Telegraph

> Company, has no charter power under the laws of Florida to construct, maintain and or operate a telephone line between the points and places sought or anywhere else in Leon or Wakulla counties, Florida, and that defendant has begun the erection of poles from a Wakulla county point towards Tallahassee in Leon county, Florida."

The circuit judge enjoined the cooperative telephone company from further construction. Motions to dissolve were filed, which were denied by the lower court, and appeal was taken.

One of the questions involved in the St. Joseph Telephone case states:

> "Does a public service corporation, with a franchise to do business in a certain locality, but not an exclusive franchise, have the right to question by injunction the extent of corporate power of another public service corporation, with a franchise to do the same kind of business, solely for the purpose of keeping down competition?"

The respondent, Southeastern Telephone Company stated the question as follows:

> "Can a court of equity in the State of Florida enjoin the construction of a telephone line in competition with another telephone line where the first mentioned telephone line has no franchise or authority to do business in a locality, or localities, county or counties, as to which the second company seeks injunctive relief because of the fact that it has an established going concern under franchise rights serving the localities sought to be served by the second company?"

In its opinion, the Supreme Court said:

> "Under the law and practice in Florida, the State may invoke appropriate judicial remedies for an abuse or violation of corporate or franchise authori-

ty that is conferred pursuant to State law; but private parties or corporations may not invoke judicial remedies for an abuse of, or a violation of, corporate or franchise authority conferred by the State. See Hitchcolk v. Mortgage Securities Corp., headnote 15, 95 Fla. 147, 115 So. 244; Vol. 10 Fletcher's Cyclopedia of Corporations, secs. 4854 et seq.

"Where private property rights are violated by a private corporation, private parties or corporations may in general invoke appropriate judicial remedies against such corporation, upon proper and sufficient allegations and proof without raising the question of a wrong to State sovereignty. See Vol. 10, Fletcher's Cyclopedia of Corporations, sec. 4856 et seq.; 19 C.J.S., Corporations, p. 441, § 981; 13 Am. Jur. 790 et seq., secs. 759, 764 et seq.

"* * *

"While the validity and scope of the corporate franchise rights conferred upon a public utility company may not be tested in a suit brought by a private party or corporation, yet when property of a public utility corporation is trespassed upon or is unlawfully injured or endangered, or the public utility corporation is unlawfully and materially hindered in the performance of its duty in rendering its authorized public service, by a potential competitor or others, the law provides for obtaining relief or redress at the suit of the injured party, East Fla. Telephone Co. v. Seaboard Air Line Ry. Co., 85 Fla. 378, 96 So. 95; and when the nature of the case warrants it under the law, and the facts are properly and sufficiently presented, appropriate judicial relief by injunction may be granted as provided by law and the principles of equity, *without adjudicating the corporate franchise rights of a defendant corporation*. Sec. 4856 et seq., Fletcher's Cyclopedia of Corporations. See Northwestern Tel. Exch. Co. v. Twin City Tel. Co., 89 Minn. 495, 95 N. W. 460; New Hartford Water Co. v. Village Water Co., 87 Conn. 183, 87 A. 358." (Emphasis ours.)

The Court, in the above case, then proceeds in its opinion to point out that the suit is based on allegations that the defendant telephone company does not have the power under its charter to lay out or build telephone lines in competitive territory of the plaintiff and that these allegations are not a necessary element in alleging irreparable injury to plaintiff's property or to its capacity to render its public service, such allegations are not appropriate in a suit by a private corporation to raise an issue as to the corporate franchise right of the defendant corporation to construct, maintain and operate telephone lines in Leon and Wakulla counties.

The Court then states that the allegations do not show that the plaintiff is hindered or injured in its capacity to render its public service, that plaintiff does not allege an exclusive franchise corporate right, and cannot complain in the courts of competition.

The Court then issued certiorari and quashed the orders below.

By an analysis of the cases and texts cited by the Supreme Court in support of the exception above stated, we believe it can clearly be shown that the instant case does not come within the stated exception.

Section 4586 et seq., Fletcher's Cyclopedia of Corporations, states in part:

> "In so far as the ultra vires or illegal acts of a corporation result in injury only to the public interests or property, they are remedial only at the instance of the state, and a private person not specially injured thereby may not proceed on his own initiative and in his own name to have such acts enjoined."

The first case cited by the Supreme Court is Northwestern Tel. Exch. Co. v. Twin City Tel. Co., 89 Minn.

495, 93 N.W. 460. Northwestern Telephone sought to enjoin Twin City from interfering with its lines and wires that had been previously established in Minneapolis. The plaintiff Northwestern, pursuant to statute in 1878, instituted telephone service in Minneapolis and had since that time expanded its service. At the time the suit was instituted, plaintiff was serving several thousand subscribers in Minneapolis which, of course, necessitated many miles of line strung on hundreds of poles.

In 1898, defendant Twin City obtained permission from the city to install its poles and lines. It so placed its lines, however, that in many instances at street crossings they intersected at right angles the lines of plaintiff immediately thereunder, of which rights and location the defendant had ample notice. It was found by the lower court that in repairing the plaintiff's lines and in adding new wires thereto, the presence of the intersecting lines, as maintained by the defendant rendered it more dangerous, difficult and expensive for plaintiff to add or replace its own lines.

The Supreme Court of Minnesota affirmed the granting of the injunction on the narrow basis of an interference with established rights by stating:

> "As between two corporations exercising similar franchises upon the same street, priority, though it does not create monopoly, carries superiority of rights, and equity will adjust conflicting interests, as far as possible, controlling them, so that each company may exercise its own franchise as fully as is compatible with the necessary rights of another's. But, where interference is unavoidable, the later occupant must give way."

The second case cited under the exception by the Florida Supreme Court is New Hartford Water Co. v. Village Water Co., 87 Conn. 183, 87 A. 358. The plaintiff had been granted a franchise to furnish New Hartford and

Barkansted water for public and domestic use. The defendant's predecessor had furnished water on a voluntary basis prior to plaintiff being granted a franchise and on July 18, 1905, defendant was granted a franchise to furnish water to the same persons that were subscribers to the prior voluntary association. In 1904, the plaintiff had completed its underground pipe lines and reservoir construction. Thus in 1905, when defendant began laying its waterlines, it of necessity had to place the underground lines along or near to plaintiff's pipelines.

The plaintiff sought to enjoin the defendant on the basis that defendant was exceeding its corporate powers as established by special charter, and that plaintiff had an exclusive right to lay pipelines under the streets of New Hartford by virtue of its own prior special charter. The lower court refused the injunction.

The Supreme Court of Errors of Connecticut held that in order for plaintiff to have an exclusive right, it must be expressly provided in the charter, and since plaintiff's charter did not contain such provision, plaintiff does not have the claimed exclusive right. The Court noted that only the stockholders of defendant corporation or the state or parties who receive some special damage from claimed ultra vires acts have a standing to question whether defendant is exceeding its charter powers. After finding that the defendant had not in fact damaged plaintiff's lines while installing its own pipelines, the Court affirmed the denial of the injunction. The opinion also points out in effect that if the Legislature wanted to exclude certain "persons" from subscribing to defendant's service, the Legislature could have done so, and, in the absence of this provision, this legislative intent will not be presumed.

The other case cited by the Florida Supreme Court under the exception is East Florida Telephone Co. v.

Seaboard Air Line Railway Co., 85 Fla. 378, 96 So. 95. Seaboard sought an injunction against the defendant Telephone Company to enjoin the defendant from placing its telephone poles on plaintiff's railroad right of way. It appears that the defendant had proceeded to install poles and string lines on plaintiff's right of way without permission from or offer of compensation to plaintiff. The lower court overruled defendant's demurrer to the complaint and defendant appealed.

Although the appeal was decided on the basis of telephone companies being granted power of eminent domain by section 4374, Revised General Statutes, 1920, the Supreme Court did cite the following principle:

> "The establishment of a telephone line of poles and wires *upon a railroad right of way without consent or compensation duly secured* is unlawful, and such establishment may under circumstances affording an equity be enjoined if timely and appropriate proceedings be duly taken." (Cases omitted.) (Emphasis ours.)

Considering these three cases together it is clear that a public utility, which does not have an exclusive franchise, and is first in its lawful occupation and special use of streets, public places, and rights of ways, may ordinarily obtain injunctive relief against threatened acts of a competitor only when these threatened acts would actually damage a specifically owned property or property right. Illustrative instances when these injunctions have been granted are collected and reported in Anno. 119 ALR 432, 1939.

The complaint upon which the restraining order was predicated, filed by the plaintiff Tampa Electric Company in case No. 1002, states in part:

> "3. That the plaintiff is supplying adequate central station service to the Valencia Motel and Restaurant

location on U. S. Highway 301 near Dade City, in Pasco County, Florida. . .

"4. That immediately prior to the filing of this complaint, the plaintiff has been furnishing service to the Valencia Motel and Restaurant location for more than 1½ years previously, and has furnished service to numerous customers on U. S. Highway 301 in the immediate vicinity of said motel for over five years.

" * * *

"6. Upon information and belief, the plaintiff alleges that the defendant plans to provide electric power service for said Motel, and for other customers of the plaintiff in the surrounding area, and in furtherance of said plan, the defendant has committed the following overt acts, to-wit:

"(a) Defendant has built a distribution line of approximately 12,600 volts a distance of approximately 4½ miles through territory served by the plaintiff to the Valencia Motel & Restaurant location.

"(b) Defendant has installed a pole framed for the installation of transformers to supply electric current to said Valencia Motel & Restaurant location.

"(c) That the defendant has submitted to the president of the Valencia Motel & Restaurant a written proposal for supplying electric current to said business, and upon information and belief, plaintiff says an agreement has been concluded for supplying electric current to said Valencia Motel & Restaurant by the defendant."

The plaintiff then alleges that unless the defendant is restrained, the plaintiff will be irreparably injured by losing profits from the sale of electric energy to the aforesaid Motel; that this action will create a precedent and will encourage the defendant to encroach upon other areas now served from the plaintiff; and that the plaintiff

will suffer other losses which will be difficult to accurately determine by reason of equipment and services which will be wasted or thrown into disuse.

The complaint in case No. 1149 follows the same tenor of the complaint in Case No. 1002 and alleges in addition that the plaintiff Tampa Electric Company is supplying adequate services to Lindsey and Chapman on their premises and location on the west side of Highway 301 from which location Lindsey and Chapman are operating the Clay-Hyder Trucking business; that the real property is owned by Southern Leasing, Inc., a Florida corporation, in which David A. Lindsey is President, Ronald J. Chapman is First Vice-President, Kenneth W. Lindsey is Second Vice-President; and William A. Ross is Secretary, all four of whom constitute said corporation's directors, and who own 150 shares, 150 shares, 100 shares, and 10 shares respectively, which shares constitute all of the outstanding stock of the corporation; that the plaintiff has been rendering adequate central station service to Lindsey and Chapman at said location for approximately 2¾ years; that Lindsey and Chapman are expanding their operations and facilities and have constructed a much larger building adjacent to the property now occupied by them and being served by plaintiff, and that the new building will be between 300 and 400 feet from the present building. The complaint then avers that the Withlacoochee River Electric Cooperative, Inc., has offered to supply electric service to this new building and this new service is sought to be enjoined in this suit.

The two complaints above discussed nowhere charge any trespass or any injury to the plaintiff corporation in any respect except that the cooperative defendant seeks to complete with it in the electric supply business. Nowhere in the complaints do we find any facts that would bring these two cases within the orbit of the exceptions set forth by the Supreme Court in St. Joseph Telephone & Telegraph Co. v. Southeastern Telephone Co., supra.

The complaint is directed at an alleged ultra vires act on the part of the Withlacoochee River Electric Cooperative, Inc. in invading the trade territory allegedly controlled by the Tampa Electric Company in violation of Section 425.04, Florida Statutes.

The legal effect of the complaint in this case is identical with the facts set forth by the Supreme Court in its decision in St. Joseph Telephone & Telegraph Co. v. Southeastern Telephone Co., supra, in which that Court held that the private corporation could not bring the suit inquestion.

It is the opinion of this Judge that each of these two cases should be reversed for the purpose of dissolving the temporary restraining orders heretofore entered and to enter an order dismissing the complaint in each case.

MURPHREE, JOHN A. H., A.J., DISSENTING.

I would affirm the chancellor because I think these cases fall within the exception stated in St. Joseph Telephone & Telegram Co. v. Southeastern Telephone Co., 5 So. 2d 55 (Fla.), thus entitling Tampa Electric Company to injunctive relief. And because I think the Withlacoochee River Electric Cooperative, Inc. violated the intendment of F.S. 425.04 (4), to the direct injury of the private property rights of the Tampa Electric Company.

To me the rationale of the St. Joseph case is that had Southeastern Telephone Co. held an exclusive franchise to serve the area in question injunction would have been considered a proper remedy to protect that right from invasion by an interloper. Here the Tampa Electric Company held the exclusive right to supply electric current to persons already receiving its service; therefore, the efficacious remedy of injunction should be available to it to suppress invasions of that right.

APPENDIX B

IN THE SUPREME COURT OF FLORIDA

JANUARY TERM, A. D. 1960

Two Cases: 1002, 1149

TAMPA ELECTRIC COMPANY, a Florida corporation,
Petitioner,

vs.

WITHLACOOCHEE RIVER ELECTRIC COOPERATIVE, INC., a non-profit Florida corporation,
Respondent.

Opinion filed June 24, 1960

Writs of Certiorari to the District Court of Appeal, Second District

Charles S. Ausley of Ausley, Ausley & McMullen and Sam Bucklew of Bucklew, Ramsey & Phillips, for Petitioner

George C. Dayton, Charles Luckie, Jr., of Dayton, Dayton & Luckie and J. Lewis Hall of Hall, Hartwell & Douglass, for Respondents

HOBSON, J.

This litigation involves two consolidated petitions for writs of certiorari on the alleged ground that the District Court's decisions[1] are in direct conflict with this court's decision in the case of *St. Joseph Tel. & Tel. Co.* v. *Southeastern Tel. Co.*, Fla. 1941, 149 Fla. 14, 5 So.2d 55.

[1] Fla. App., 1959, 115 So.2d 9 and 17.

The Second District Court of Appeal's opinion reflects the following pertinent facts:

> "Tampa Electric Company is engaged in the business of manufacturing, distributing and selling electric energy. It is a public utility company in the State of Florida within the definition of Chapter 366, Florida Statutes, F.S.A., and holds a non-exclusive franchise to do business in the territory involved in this case.
>
> * * * * *
>
> The Withlacoochee River Electric Cooperative, Inc., is engaged in the same business as the Tampa Electric Company but is organized and exists under Chapter 425, Florida Statutes, F.S.A., which is an incorporation statute for cooperative, non-profit membership corporations, desiring to be organized thereunder, for the purpose of supplying electric energy in rural areas. A 'rural area' is defined therein as:
>
> "'* * * any area not included within the boundaries of any incorporated or unincorporated city, town, village, or borough having a population in excess of twenty-five hundred persons;'
>
> "Section 425.04 sets out the powers given by the legislature to such cooperatives, included among which is the power to sell electric energy in rural areas (Subsection 4):
>
> "'* * * provided, however, that no cooperative shall distribute or sell any electricity, or electric energy to any person residing within any town, city or area which person is receiving adequate central station service or who at the time of commencing such service, or offer to serve by a cooperative is receiving adequate central station service from any utility agency, privately or municipally owned individual partnership or corporation;'."

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[2] Fla. App., 1959, 115 So.2d 9.

Being an electric utility cooperative, Withlacoochee is not subject to the provisions of Chapter 366. In the instant cases Tampa Electric obtained a temporary restraining order enjoining Withlacoochee from furnishing electric energy to certain persons in a *rural area*.

> "In the instant case Withlacoochee was restrained from supplying service to a corporation. *The basis for the chancellor's findings was that the corporation is but the alter ego of a partnership on adjoining land, which Tampa Electric was at the time serving. Ordinarily, such a suit could not be brought by the Tampa Electric, but would have to be brought by the state itself.* In their complaint Tampa Electric alleged that unless the restraining order was so entered, it would take away from Tampa Electric certain valuable *property rights* by virtue of depriving Tampa Electric of the revenue which it would receive from the services to be rendered in the future and that the Tampa Electric would be irreparably injured thereby. So, in deciding the right of Tampa Electric to bring this suit we must necessarily take into account the allegations of the complaint, which we have just paraphrased." (Emphasis supplied.)

Referring to the foregoing, the majority of the District Court reversed the chancellor's order on the principle [illegible]d that under this court's decision in the *St. Joseph* case, supra, Tampa Electric does not have sufficient standing in a court of equity to bring the instant suits.

Associate Judge Murphree dissented because it was his belief that these cases fell within the exception to the general rule established in the St. Joseph case.[4] He also

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[3] Withlacoochee River Electric Coop. v. Tampa Electric Co., Fla. App. 1959, 115 So. 2d 9, 10.

[4] The rule and its exception may be found in St. Joseph Tel. & Tel. Co. v. Southeastern Tel. Co., Fla. 1941, 149 Fla. 14, 5 So.2d 55, 57 and 58.

indicated that the cooperative's action violated the intendments of § 425.04(4), F.S.A. to the direct injury of the private property rights of Tampa Electric.

The following excerpt from the opinion in the *St. Joseph* case, supra, is pertinent for our consideration in view of the fact it was and is relied on by both the petitioner and the respondent, as well as being the basis of the District Court's decisions:

> "Under the law and practice in Florida, the State may invoke appropriate judicial remedies for an abuse or violation of corporate or franchise authority that is conferred pursuant to State law; but private parties or corporations may not invoke judicial remedies for an abuse of, or a violation of, corporate or franchise authority conferred by the State.
>
> "While the validity and scope of the corporate franchise rights conferred upon a public utility company may not be tested in a suit brought by a private party or corporation, *yet when property* of a public utility corporation *is trespassed upon or is unlawfully injured or endangered, or the public utility corporation is unlawfully and materially hindered in the performance of its duty in rendering its authorized public service, by a potential competitor or others, the law provides for obtaining relief or redress at the suit of the injured party,* East Fla. Telephone Co. v. Seaboard Air Line Ry. Co., 85 Fla. 378, 96 So. 95; and when the nature of the case warrants it under the law, and the facts are properly and sufficiently presented, appropriate judicial relief by injunction may be granted as provided by law and the principles of equity, *without adjudicating the corporate franchise rights of a defendant corporation.* Sec. 4856 et seq., Fletcher's Cyclopedia of Corporations. See Northwestern Tel. Exch. Co. v. Twin City Tel. Co., 89 Minn. 495, 95 N. W. 460; New Hartford Water Co. v. Village Water Co., 87 Conn. 183, 87 A. 358." (Emphasis supplied.)

The petitioner maintains the activities of Withlacoochee "resulted in damage to the property rights of Tampa Electric by the loss of profits and by the waste and disuse of equipment".

It is our opinion that the complaint in this case sufficiently alleges that the cooperative in these cases has used its preferential economic advantage as a means of extending its service to customers previously being adequately served by Tampa Electric. Such activity exceeds not only the fundamental underlying purpose which motivated the establishment of the rural electrification program, but also it violates the plain language as well as the spirit of Section 425.04, F.S.A. Further, we are in accord with the petitioners and Asspciate Judge Murphree in their conclusion that the cooperative's activities are tantamount to an unlawful injury or hinderance of Tampa Electric's property rights.

The opinion and decision herein rendered by the District Court of Appeal, Second District, is in direct conflict with our decision in the case of St. Joseph Tel. & Tel. Co., v. Southeastern Tel. Co., Fla. 1941, 149 Fla. 44, 5 So. 2d 55, in that said court followed the general rule laid down in the St. Joseph case, whereas it should have followed the exception set forth therein. The District Court of Appeal's opinion shows on its face, by paraphrasing the allegations of the complaint, that the ex-

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Mere change in ownership of business structure does not make the fact that Tampa Electric was previously providing adequate service to the precise sites involved.

It is a matter of common knowledge that the real purpose to be served in the creation of REA was to provide electricity to those rural areas which were not being served by any privately or governmentally owned public utility. It was not intended that REA should be a competitor in those areas in which as a matter of fact electricity is available by application to an existing public utility holding a franchise for the purpose of selling and serving electricity in a described territory.

ception to the general rule laid down in the St. Joseph case should have been applied to these cases.

The orders of the District Court of Appeal, Second District, to which these petitions for certiorari are directed, should be and are hereby quashed, with directions that said court enter orders consistent with this opinion and remand these cases for further proceedings in the Circuit Court of the Sixth Judicial Circuit.

It is so ordered.

THOMAS, C.J., TERRELL, ROBERTS, DREW, THORNAL and O'CONNELL, JJ., concur.

APPENDIX C

OPINION AND DISCUSSION BY THE TRIAL COURT WITH COUNSEL PRIOR TO ENTRY OF FINAL DECREE

(September 21, 1961)

THE COURT: * * * We have had facts, law, and reasoning regarding interpretation of the word "person" in the State law and in the Federal law. I have two limitations within which I must operate, if not completely at least in part. Those two limitations are the decision that we have from the Supreme Court and the practical result of any final order or decree that I might enter. It is my thinking that even though this proceeding was remanded back here that we should not use this forum merely as an additional appeal, but rather the matters as to legislative intent and administrative interpretation should have been or should be handled in one of two ways: either these matters should have been presented to the Supreme Court before it rendered its last decision, or, if an appeal result from this case and goes to the Supreme Court, it should be left to the Supreme Court to completely change its interpretation if that is the Supreme Court's desire. That does not keep me from rendering certain interpretations within the general framework of the Supreme Court decision.

One other thing that I would like to point up about interpretation and legislative intent and administrative interpretation is this: that I recognize that it might well be that different conclusions would result from the trial of this case in state courts and in Federal courts. As it is not my desire to act as a court of appeal, it is also not my desire to express myself in the same fashion that a Federal court would perhaps express itself. I feel that the initial sovereignty rests in the State of Florida

and that the Federal government has only delegated sovereignty; that while the Federal government may exercise control over portions of the rural electrification organization, such as financing and criteria for financing, that still we have statutes in the State of Florida that govern us, which statutes have not yet been found to be unconstitutional. Accordingly we are bound by those statutes.

Now, to return to interpretation of the word "person", the logic of the argument of counsel for the defendant is undeniable about interpretation of that word; however, that forms one extreme, the other extreme being formed by a possible interpretation that an entire area is intended. I do not feel that a rural electric cooperative is prohibited from coming in an area which constitutes a gross or large area merely because a private utility is in that area. In between these two extremes we have the facts of these two cases to consider and the fact about availability in each case is this: that the service was available, not remotely but immediately adjacent to the place to be served.

Again as to interpretation of the word "person", if we are to say that "person" means only literally an individual or corporate or other business person, then we have to be aware that the name and form of such persons can and do change frequently. We have seen in this case that Messrs. Lindsey and Chapman either intentionally or unintentionally, as they are entitled to do, have changed the name and form of their business many times and in many ways. To rely upon the strict interpretation of the word "person" would cause us in effect to chase our quarry from the open field where we can readily see it into a jungle where we may never find it. It's like trying to continuously identify one shape or form in a constantly changing kaleidoscope, again for the reason that the name and form of people who do

business and who might be customers can and do change without any control and with great rapidity. Accordingly I think we must give some effect, if not completely at least partially, to the interpretation of the Supreme Court in its footnote recitation about the word "site" as bearing upon interpretation of the word "person". I think that it is not necessary that we cause a complete substitution of the word "site" for "person", but I think that the word "site" can be merely an amplification of the word "person". The phrase "person at a particular site" is more broad in meaning than the mere word "person" or the mere word "site".

We must in some fashion as a practical matter find some way of stabilizing the situation to accomplish a practical and just result.

Again as to availability of service, I cannot decide here and now as to an arbitrary distance that a private utility may or may not be from a particular customer or site before a rural electric cooperative is entitled to come into the picture. I can only say that if the private utility is removed some considerable distance then there is no question about the right of a rural electric cooperative. I can also say conversely that in these two cases it appears that the private utility had service which was then adequate for the requirements at that time immediately adjacent to the property lines.

If we were to say that a company that has a power line going down one property line of a proposed customer had no rights of pre-emption merely because it was not physically attached to the premises to be served and was in fact serving that customer or site, we would be doing something which is contrary to the public interest; we would be inducing additional competition. Competition in and of itself is not necessarily to be avoided, but the result of the competition in this unique field, which result is wasteful duplication of rather expensive installa-

tions, is to be avoided. There is an old Oriental saying that when elephants battle it is the grass that suffers, and if we cause these two industries to increase their competitive spirit from the viewpoint of pre-empting customers, then eventually it is the customer who will suffer through the necessarily increased rates and charges. And I think it is against public policy to induce this type of competition where the competition does not result necessarily in the betterment of service or a reduced rate for that service.

Now, it appears to be the philosophy that the Supreme Court of this State has adopted that rural electric cooperatives are supplemental to private industry. If they be so, then it is also true that rural electric cooperatives and private industry do not and are not intended to compete on an equal basis. The contentions of the defendant that to let the plaintiff prevail would cause restriction upon the service of the defendant might well be true, but under the philosophy announced by the Supreme Court it would appear that the rural electrification program was a stop-gap program, a crash program, if you please, and that as a part of that program there is a conscious and planned program of anticipated attrition. In other words, as an area becomes more urbanized, as certainly this area is, it is within the scope of that philosophy that eventually there would be no rural electric cooperative. We have to look at the time and the situation in which rural electric cooperatives were started, not only in this area but in all areas. They had several governmental purposes to serve. Some of these purposes were economic, some of them were social. But the mere fact that creation does not, so long as that creation is for a specific purpose, necessarily mean that some program that has been created must always exist. It may well be that in the future these rural electric cooperatives will be converted to regular private industries on an equal basis with other private industry. Certainly if the

philosophy is to give private industry the pre-emption, as it appears to be from our Florida statutes, then these facilities may at some time in the future be acquired by private industry. Again it may be an indication of urbanization that there are private industries now in this county which are willing to come in and serve customers. That is a fact that has been discussed by counsel here, and I think cannot well be controverted.

My point simply is that I recognize that under the statutes competition is not on an equal basis, and apparently from the Supreme Court's interpretation of the statute it is not intended to be on a free and equal basis. To go to the other extreme, if it were the philosophy that the rural electric cooperatives were the dominant party in the field, then under the statute and even under the United States legislative and administrative interpretations, that philosophy would have to be rejected, although it has not been presented here.

The competition, or rather the injury of which the plaintiff complains, is not necessarily the injury of competition which, as counsel for the defendant has pointed out, perhaps is not enough in and of itself to give relief, since it might well constitute damage without injury. However, it is my perception that the damage of which the plaintiff complains is based not on the matter of competition but is based directly and amply upon damage which results from violation of the statute. If the statute is violated it matters not whether that damage also might incidentally result in some measure from some other activity, such as competition.

The two property rights alleged by the plaintiff to be affected: those of loss of profits and disuse of property, have both been borne out by the facts. The allegation is a brief one, and the proof was ample and direct, so that the allegation, for what it is worth, was proved. Accordingly, if the Supreme Court found that the allegation

was sufficient, then I see no genuine basis upon which to say that the plaintiff cannot be in court on this case.

Again I wish to say that there is a great temptation to decide more than what is at issue here and to try to set some rules and especially some physical limitations or distances, but I think to do so in this case would be error, especially since it would take much more investigation, much more proof of other circumstances not admissible here, before a valid overall rule could be laid down.

I feel that it is contrary to public policy to encourage either party to over-extend its facilities merely to attempt to pre-empt customers. It will be highly desirable if the facts were explored between the two parties which, when explored, would usually lead to a logical result as to which party should serve a particular group of customers in a particular area. This decision of mine is not intended in any way to be encouraging to Tampa Electric Company or any other private utility to extend itself either beyond normal extension or in any awkward or unbalanced fashion to try to pre-empt customers. Tampa Electric has a system of a particular design which is intended to serve well particular customers in particular areas, and that it should do with normal expansion. Neither is this decision intended to discourage the Withlacoochee River Electric Cooperative, Inc., from coming to new conclusions about customers or areas which are not now adequately served and which can be served by the Co-op. The situations which I have seen from the testimony here submitted and the exhibits wherein in some small areas the lines of both companies are intermingled and cross each other repeatedly, and in truth and in fact do really duplicate each other, are undesirable, and those situations should not be repeated.

Off the record—

(Brief discussion off the record.)

THE COURT: If Tampa Electric Company lines are immediately adjacent or bordering the premises, then Tampa Electric should be permitted to serve, because then adequate service is available within a reasonable interpretation of the word "available". If, at the outset of demand for service by a particular customer, there is a line of the Co-op that was not constructed or extended for the purpose of serving that customer substantially closer to the customer than Tampa Electric Company's line, then adequate central station service is not, within a reasonable meaning, readily available from Tampa Electric Company and the Co-op would be entitled to serve. If they are equidistant, if that unusual circumstance were to occur, if they are equidistant and their facilities not constructed for the purpose of reaching that customer, I think that is the almost incredible situation in which either one of them would be authorized to serve, depending upon request from the customer.—

MR. LUCKIE: Let me ask a question here—

THE COURT: (Continuing) . . . so long as the equidistant lines are not within the meaning of being immediately or substantially adjacent. Now, if the line of Tampa Electric Company is closer to the property than the line of the Co-op, that is a situation for which I have no answer, because then the distance between the Tampa Electric line and the customer needs to be interpreted as to whether or not adequate central station service is reasonably available. I can tell you that if it is alongside the property line, it is available; if it is several miles away, it is not available. In that no-man's land is something that has to be the subject of good judgment, but admittedly exercised at one's own peril.

APPENDIX D

[Not Final Until Time Expires to File Rehearing Petition and If Filed, Disposed of.]

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT—148 So. 2d 732

JULY TERM, A. D. 1962

Case No. 3309

WITHLACOOCHEE RIVER ELECTRIC COOPERATIVE, INC., a non-profit Florida corporation, and SOUTHERN LEASING, INC., a Florida corporation,

Appellants,

v.

TAMPA ELECTRIC COMPANY, a Florida corporation,

Appellee.

and

Case No. 3310

WITHLACOOCHEE RIVER ELECTRIC COOPERATIVE, INC., a non-profit Florida corporation, and VALENCIA RESTAURANT & MOTEL, INC., a Florida corporation,

Appellants,

v.

TAMPA ELECTRIC COMPANY, a Florida corporation,

Appellee.

Opinion filed November 28, 1962.

Appeal from the Circuit Court for Pasco County; Charles M. Phillips, Jr., Judge.

Dayton, Dayton & Luckie, Dade City for Appellants.

Busklew & Ramsey, Tampa; Larkin, Larkin & Goodson, Dade City; Ausley, Ausley, McMullen, O'Bryan, Michaels & McGehee, Tallahassee, for Appellee.

KANNER, JUDGE.

Two appeals from final decrees permanently enjoining Withlacoochee River Electric Cooperative, Inc., defendant-appellant, from serving electric energy to defendants-appellants Southern Leasing, Inc., and Valencia Restaurant & Motel, Inc., were consolidated for purposes of the appeal and for oral argument before this court; and the cases were consolidated for hearing below.

Tampa Electric Company, the plaintiff-appellee, is a Florida corporation classified a "public utility" as defined within Chapter 366, F.S.A. That company supplies electricity to customers in Hillsborough, Pinellas, Polk, and Pasco Counties. As to the present case it is serving customers in Pasco County under a non-exclusive franchise from the county. Withlacoochee is a non-profit rural electric cooperative deriving its authority under Chapter 425 F.S.A.; and, unlike the Tampa Electric Company, is not categorized under Florida law as a public utility nor subject to regulation by the Florida Railroad and Public Utilities Commission.

Initially, the circuit court entered temporary restraining orders. These subsequently were made the subject of interlocutory appeals to this court, two cases, Withlacoochee River Elec. Coop. v. Tampa Electric Co. as reported in Fla. App. 1959, 115 So. 2d 9 and 17. We reversed the temporary restraining orders and held that the Tampa Electric Company did not have sufficient standing in a court of equity to bring the suits. Petitions for writ of certiorari were taken to the Supreme Court, grounded upon direct conflict of this court's decisions with that of the Supreme Court of Florida in the case of St. Joseph

Telephone & Telegraph Co. v. Southeastern Telephone Co., 1941, 149 Fla. 14, 5 So. 2d 55. The Supreme Court quashed the orders of this court ". . . with directions that said court enter orders consistent with this opinion and remand these cases for further proceedings in the Circuit Court of the Sixth Judicial Circuit." Tampa Electric Co. v. Withlacoochee River Elec. Coop., Fla. 1960, 122 So. 2d 471, 474.

This court need not here set out the facts as contained within the two complaints and relied upon by the Tampa Electric Company for injunctive relief, because, in essence, these are sufficiently expressed in the main and concurring opinions emanating from the interlocutory appeals above mentioned.

The chancellor heard and reviewed the evidence offered by all the parties. As has been indicated, he determined that Tampa Electric Company was entitled to relief and made the temporary restraining orders permanent.

Appellant poses for reversal four points. These assert, substantially, that the appellee is not entitled to maintain the suits, since it is complaining of competition without having a property right to be free from competition or any other special interest or private right entitling it to an injunction; that appellant Withlacoochee has the authority under Chapter 425, F.S.A., to serve the other appellants with electric power; that interpretation of Section 425.04, Florida Statutes, so as to prevent Withlacoochee from doing this deprives these appellants of equal protection of the law and of their property under the State and Federal Constitutions; and that such interpretation impairs the obligation of a contract for the sale and use of electric power between these appellants in violation of the State and Federal Constitutions. It is the position of appellee that the question to be decided is whether or not appellee has sustained the allegations of its respective complaints through the required proof.

We quote the Supreme Court's conclusions from 122 So. 2d 473-4:

> "It is our opinion that the complaint in this case sufficiently alleges that the cooperative in these cases has used its preferential economic advantage as a means of extending its service to customers previously being adequately served by Tampa Electric. Such activity exceeds not only the fundamental underlying purpose which motivated the establishment of the rural electrification program, but also it violates the plain language as well as the spirit of Section 425.04, F.S.A. Further, we are in accord with the petitioners and Associate Judge Murphree in their conclusion that the cooperative's activities are tantamount to an unlawful injury or hindrance of Tampa Electric's property rights.
>
> "The opinion and decision herein rendered by the District Court of Appeal, Second District, is in direct conflict with our decision in the case of St. Joseph Tel. & Tel. Co. v. Southeastern Tel. Co., 1941, 149 Fla. 14, 5 So. 2d 55; in that said court followed the general rule laid down in the St. Joseph case, whereas it should have followed the exception set forth therein. The District Court of Appeal's opinion shows on its face, by paraphrasing the allegations of the complaint, that the exception to the general rule laid down in the St. Joseph case should have been applied to these cases." (Footnotes omitted).

Thus, the case law is established. It is clearly held that the complaints state causes for relief. Consequently, we agree that the position stated by appellee is the correct one. From our study of the evidence, we find that it fulfills the probative requisites, as was found by the chancellor. We do not find that there was a holding by the chancellor on any question of constitutionality. These appeals were first lodged in the Supreme Court, and it was there decided that jurisdiction was vested here, with the

result that the appeals were ordered to be transferred to this court for determination. This court, therefore, affirms the permanent restraining orders as entered.

Affirmed.

SHANNON, C. J., and SMITH, J., CONCUR.

APPENDIX E

[Not Final Until Time Expires to File Rehearing Petition and, if Filed, Determined.]

IN THE SUPREME COURT OF FLORIDA

158 So. 2d 136

JULY TERM, A. D. 1963

Case No. 32,629

WITHLACOOCHEE RIVER ELECTRIC COOPERATIVE, INC., a non-profit Florida Corporation, and VALENCIA RESTAURANT & MOTEL, INC., a Florida corporation,
Petitioners,

vs.

TAMPA ELECTRIC COMPANY, a Florida corporation,
Respondent.

Opinion filed November 1, 1963

Writ of Certiorari to the District Court of Appeal, Second District

Dayton, Dayton & Luckie, for Petitioners

Sam Bucklew of Bucklew, Ramsey & Stichter; William B. Goodson of Larkin, Larkin & Goodson; D. Fred McMullen of Ausley, Ausley, McMullen, O'Bryan, Michaels and McGehee, for Respondent

PER CURIAM.

Pursuant to the prayer of a petition for certiorari because of an alleged conflict between the instant decision of the District Court of Appeal, Second District, and the decision of this Court in St. Joseph Telephone and Telegraph Co. v. Southeastern Telephone Co., 5 So. 2d 55, we issued the writ. Inasmuch as a jurisdictional conflict

of decisions appeared questionable, we set the matter for hearing upon both jurisdiction and merits. Having heard oral arguments and upon further careful study of the record and briefs, we are now convinced that the District Court followed the prior decision of this Court and did not render a decision in conflict therewith.

As a matter of fact, the District Court's decision is consonant with our prior decision in the instant suit. In that decision we merely held that the complaint stated a cause of action and if the allegations of said complaint were proven Tampa Electric would be entitled to the relief which it sought. Upon remand testimony was taken and a final decree favorable to Tampa Electric was entered. In the final decree the Chancellor made the following finding: ". . . the plaintiff has sustained the allegations of its complaint by competent proof and its entitled to the relief prayed for. . . ." This decree was affirmed by the District Court of Appeal Second District.

"We have decided time and time again that this Court will not re-weigh or re-evaluate the testimony in order to determine its jurisdiction when it is sought to be invoked upon the theory of conflict in decisions. We see no reason to recede from this firmly established rule in this case." Moreover, we considered and discussed the case of St. Joseph Telephone and Telegraph Co. v. Southeastern Telephone Co., supra, in our opinion on the first appearance of this cause, and disposed of all pertinent questions now attempted to be raised again, in and by the present petition for a writ of certiorari.

It appears that some confusion has arisen with reference to Footnote =6, page 473 of our opinion, published in 122 So. 2d, beginning at page 471. It should be perfectly clear even to a novitiate that the remarks contained

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*Tampa Electric Co. v. Withlacoochee River Electric Cooperative, Inc., 122 So. 2d 471.

in said footnote were unnecessary to the decision which we reached, were not pronouncements of law but merely philosophical observations, and constitute nothing more nor less than obiter dicta. They should be so treated by the bench and bar.

The petition for writ of certiorari filed herein should be and it is hereby denied.

ROBERTS, Acting Chief Justice, THORNAL and CALDWELL, JJ., and WALKER, Circuit Judge, concur

HOBSON (Ret.), J., concurs specially

HOBSON, (Ret.), J., Concurring Specially.

I fully concur in the foregoing order denying the petition for writ of certiorari filed herein.

Nevertheless because I was the author of this Court's opinion appearing in 122 So. 2d 471, I am impelled to make some remarks concerning Footnote #6 on page 473 of the published opinion. In the first place it is not the custom of this Court to place in any footnote pronouncements of law necessary to the decision reached. As has been said, these statements were simply "philosophical observations" and are nothing more nor less than obiter dicta. Personally I am still of the view that the first of these statements is correct. It appears that the present administrator of the Rural Electrification Administration has construed the provision of the Rural Electrification Act "The administrator is authorized and empowered to make loans * * * for the furnishing of electric energy to persons in rural areas who are not receiving central station service" in the following manner:

> "It is presently the position of the Rural Electrification Administration as it has always been since the enactment of the Rural Electrification Act that a

loan may be made for facilities to serve a person to whom central station service is otherwise available if he is not in fact being served. The statutory test as the act clearly states is the absence and not the unavailability of service."

I was surprised, not to say shocked and amazed, when counsel for the petitioner furnished us with the foregoing information. However, my first statement in Footnote #6 appears to be supported by an editorial appearing in the Tallahassee Democrat under date of October 2, 1963. The editor who prepared the editorial to which I refer is one of the most able, experienced and well-informed editorial writers of the present era and his philosophy with reference to my second statement in Footnote #6 appears to square with my own. In fact his reasoning is sound and logical if not irrefragable.

I quote the aforementioned editorial in full:

"REA SHOULD STICK TO ITS ROLE

"The Rural Electrification Administration was set up in the 1930s to bring electricity to farm families who couldn't be reached by private power lines. This it has done. Today, 98 per cent of the farms in the nation have electricity.

"Looking for new fields to conquer, the cooperatives sponsored by REA are branching beyond the farms. With the government financing them with 2 per cent interest loans and no income tax on earnings they can outbid private utilities. That means the taxpayer pays the subsidy and the government loses the utility's taxes. Obviously, this is unfair competition.

"REA should be confined to its own field, if it still has fields to develop. It should not be allowed to expand, bureaucratically, for the mere sake of expanding. It might be time to decide that where it has served its purpose of electrifying areas that could not

be reached by private power, it either should be made to stand on its own feet with no special government subsidies, or be sold to taxpaying private power companies with sale proceeds going to retire some of the national debt it helped create."

APPENDIX F

UNITED STATES STATUTE

7 U.S.C.A., 902, 904 and 913

Section 902: "The Administrator (of the 'Rural Electrification Administration') is authorized and empowered to make loans . . . for rural electrification and the furnishing of electrical energy to persons in rural areas who are not receiving central station service. . . ."

Section 904: "The Administrator (of the 'Rural Electrification Administration') is authorized and empowered . . . to make loans for rural electrification to . . . corporations . . . and cooperative, nonprofit, or limited-dividend associations . . . for the purpose of financing the construction and operation of . . . electric transmission and distribution lines or systems for the furnishing of electric energy to persons in rural areas who are not receiving central station service. . . ."

Section 913: "As used in this chapter (31) the term 'rural area' shall be deemed to mean any area of the United States not included within the boundaries of any city, village, or borough having a population in excess of fifteen hundred inhabitants, and such term shall be deemed to include both farm and non-farm population thereof; . . ."

APPENDIX G

FLORIDA STATUTE

Section 425.04, Florida Statutes,

". . . provided, however, that no cooperative shall distribute or sell any electricity, or electric energy to any person residing within any town, city or area which person is receiving adequate central station service or who at the time of commencing such service, or offer to serve, by a cooperative, is receiving adequate central station service from any utility agency, privately or municipally owned individual partnership or corporation."

APPENDIX H

UNITED STATES CONSTITUTION

Art. I, Sec. 10, clause 1:

> "No State shall . . . pass any . . . law impairing the obligation of contracts. . . ."

Fourteenth Amendment, Sec. 1:

> ". . . nor shall any State deprive any person of . . . property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."